Filed 12/18/15 P. v. Cook CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES C. COOK III, Defendant and Appellant.	A144054 (Contra Costa County Super. Ct. No. 05-142125-4) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT

BY THE COURT:

It is ordered that the opinion filed herein on November 19, 2015, be modified as follows:

1. On page 3, last sentence of the first paragraph, replace the word "shall" with "may" so the sentence reads:

> Pursuant to section 666.5, in cases such as this, where a defendant has a prior conviction for the unlawful taking or driving of a vehicle, a violation of section 496d may be punished as a felony. (§ 666.5, subd. (a).)

2. At the end of the first paragraph on page 3, after the sentence ending "be punished as a felony," add as footnote 2 the following footnote, which will require renumbering of all subsequent footnotes:

> [2] Section 666.5 prescribes a punishment of "two, three, or four years, or a fine of ten thousand dollars ($10,000), or both the fine and the imprisonment." (§ 666.5, subd. (a).) A violation of section 666.5 is a "stealth wobbler," because pursuant to section 18, every offense punishable "by imprisonment or by a fine, but without an alternate sentence to the county jail for a period not exceeding one year, may be

punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both." (§ 18, subd. (b).)

3. On page 5, after the fourth sentence of the second paragraph, which ends with "obtaining a stolen vehicle," add the following sentence:

Also missing from the list of provisions amended by Proposition 47 is section 666.5, which governs defendant's punishment here.

4. The last paragraph commencing at the bottom page 5 with "Even if Proposition 47" and ending at the top of page 6 with "amended by Proposition 47," and footnote 3, are deleted in their entirety.

There is no change in judgment.

Defendant's petition for rehearing is denied.

Dated:

_____

Margulies, Acting P.J.

Filed 11/19/15 P. v. Cook CA1/1 (unmodified version)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES C. COOK III, Defendant and Appellant.	A144054 (Contra Costa County Super. Ct. No. 05-142125-4)

Defendant Charles C. Cook III, was convicted of receiving a stolen motor vehicle in violation of Penal Code[1] section 496d, as well as possession of a controlled substance. He petitioned the trial court to reduce his section 496d offense to a misdemeanor pursuant to Proposition 47. The court denied the petition and sentenced defendant to eight years. Defendant now appeals, arguing the trial court misconstrued Proposition 47, and even if Proposition 47 did not specifically amend section 496d, his sentence violates his equal protection rights. We disagree and affirm.

I. BACKGROUND

On December 10, 2014, defendant was charged by amended information with the unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)), receiving a stolen motor vehicle (§ 496d), and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). In connection with the first two charges, the information also alleged

[1] All statutory references are to the Penal Code unless otherwise indicated.

enhancements pursuant to section 666.5, for three prior convictions for unlawful driving or taking of a vehicle.

Prior to trial, defendant petitioned the court to reduce all charges to misdemeanors pursuant to Proposition 47. The court denied the petition with respect to the counts for unlawful taking of a vehicle and receiving a stolen vehicle, but indicated it would entertain defendant's argument concerning the count for possession of a controlled substance at sentencing.

A jury found defendant guilty of receiving a stolen motor vehicle in violation of section 496d and possession of a controlled substance, but it was unable to reach a verdict on the count for unlawful taking or driving of a vehicle. The trial court dismissed this last count on the People's motion. The court also found defendant had several prior convictions, including two for the unlawful taking or driving of a motor vehicle in violation of Vehicle Code section 10851, one for attempt to unlawfully take or drive a motor vehicle, and one for possession of a deadly weapon.

The court denied defendant's renewed petition to reduce his conviction for receiving a stolen motor vehicle to a misdemeanor. The clerk's transcript indicates the count for possession of a controlled substance was reduced to a misdemeanor. Defendant was sentenced to eight years, based in part on sentencing enhancements for the prior convictions pursuant to section 666.5.

II. DISCUSSION

Defendant argues that, pursuant to Proposition 47, his section 496d conviction for receiving a stolen vehicle must be reduced to a misdemeanor. He concedes Proposition 47 does not expressly mention section 496d, but argues it was clearly the intent of the voters to do so. Defendant also argues that, to the extent Proposition 47 does not reduce his section 496d offense to a misdemeanor, his equal protection rights have been violated because the proposition does reduce the punishment for similarly situated offenders. We disagree on both counts.

A. *Defendant Committed a Felony*

Section 496d punishes persons who knowingly buy or receive any motor vehicle that has been stolen or has been obtained in any manner constituting theft or extortion. (§ 496d, subd. (a).) Pursuant to the plain language of the statute, the offense is a "wobbler," as it may be punished as either a felony or a misdemeanor. (*Ibid.* [offense "shall be punished by imprisonment . . . for 16 months or two or three years . . . , or by imprisonment in a county jail not to exceed one year"].) Pursuant to section 666.5, in cases such as this, where a defendant has a prior conviction for the unlawful taking or driving of a vehicle, a violation of section 496d shall be punished as a felony. (§ 666.5, subd. (a).)

Defendant argues Proposition 47 implicitly amended section 496d, making the offense of receiving or obtaining a low-value stolen vehicle a misdemeanor. Proposition 47 reclassified certain felony and wobbler drug- and theft-related offenses as misdemeanors. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) "Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47." (*Id.* at p. 1092.) Specifically, section 1170.18 adds or amends Health and Safety Code sections 11350, 11357, and 11377, which relate to possession of controlled substances, as well as Penal Code sections 459.5, 473, 476a, 490.2, 496, and 666, which punish shoplifting, forgery, check kiting, petty theft, and receiving stolen property.

As defendant concedes, section 1170.18 does not specifically mention section 496d. Nevertheless, defendant argues that, in enacting Proposition 47, the voters intended to amend section 496d because the crimes punished by section 496d fall within the definition of crimes that were to be reduced to misdemeanors. Specifically, defendant points to Proposition 47's addition of section 490.2 and its amendment of section 496. Section 490.2 states that, notwithstanding any provision defining grand theft, the offense of obtaining property by theft where the value of property at issue does not exceed $950

shall be considered petty theft and punished as a misdemeanor. (§ 490.2, subd. (a).) Likewise, as amended by Proposition 47, section 496 punishes as a misdemeanor the offense of buying or receiving stolen property or property obtained through theft or extortion where the property at issue is worth less than $950.[2] (§ 496, subd. (a).)

Defendant contends that, reading the statutes as a whole, Proposition 47 reduced section 496d offenses to misdemeanors where the vehicle at issue is worth less than $950. Defendant reasons section 496d focuses on the same type of behavior as sections 490.2 and 496, but narrows the property to a vehicle rather to just "any" property. He also claims that because the crime of receiving stolen property was amended by Proposition 47, the omission of obtaining or receiving a stolen motor vehicle "is inconsistent" with the rest of the statute and raises an ambiguity that must be resolved by the courts. According to defendant, the key is the value of the property, not the type of property, and thus Proposition 47's failure to amend section 496d should be viewed as an oversight. Defendant also argues he introduced evidence showing the value of the vehicle he obtained was less than $950.

Our colleagues in the Fourth Appellate District recently addressed and rejected an almost identical argument concerning section 496 and Proposition 47 in *People v. Garness* (Nov. 9, 2015, E062947) __ Cal.App.4th __ [2015 Cal.App. Lexis 998]. The court explained: "Sections 496 and 496d are hardly the only sections of the Penal Code that overlap, so that the same criminal actions could be charged under either statute. Indeed, ' "[i]t is axiomatic the Legislature may criminalize the same conduct in different ways," ' thereby giving the prosecutor 'discretion to proceed under either of two statutes

[2] Section 490.2 and section 496 offenses may not be reduced to misdemeanors where the offender has a prior conviction for offenses described in section 667, subdivision (e)(2)(C)(iv). (§§ 490.2, subd. (a); 496, subd. (a).) The offenses listed in section 667, subdivision (e)(2)(C)(iv) include sexually violent offenses, oral copulation of or lewd and lascivious acts involving a child under the age of 14, any homicide offense, solicitation to commit murder, assault with a machine gun on a peace officer, possession of a weapon of mass destruction, and any serious or violent felony punishable by life imprisonment or death.

that proscribe the same conduct, but which prescribe different penalties.' [Citation.] We decline to presume, therefore, based on the similarities between section 496 and section 496d, that the absence of any explicit grant of relief to those convicted under section 496d was an omission or unintentional ambiguity in Proposition 47." (*Id.* at pp. *5–*6.) The court concluded: "[I]f Proposition 47 were intended to apply not only to reduce the punishment for certain specified offenses, but also any similar offenses, or offenses that could have been, but were not, charged as one of the specified offenses, we would expect some indication of that intent in the statutory language. We find nothing of the sort." (*Id.* at p. *6, italics omitted.) The Fourth District's reasoning is sound.

Additionally, defendant's interpretation of the statutory scheme does not comport with the statutory construction cannon of *expressio unius est exclusio alterius*. Under this cannon, the expression of certain things in a statute necessarily involves exclusion of other things not expressed. (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403.) Here, section 1170.18 lists a specific series of offenses added or amended by Proposition 47, and that list does not include section 496d offenses. Nor does it include any general reference to the offense of knowingly obtaining a stolen vehicle. We can find nothing in section 1170.18, such as the use of the word "including," that would suggest this list was not intended to be exhaustive. (See *People v. Garness*, *supra*, __ Cal.App.4th at p. ___ [2015 Cal.App. Lexis 998 at pp. *6–*7] ["It is simply not our role to interpose additional changes to the Penal Code beyond those expressed in the plain language of the additions or amendments resulting from the adoption of Proposition 47."].)

Even if Proposition 47 could be interpreted as amending 496d—and it cannot—we would still conclude defendant's sentence was appropriate because defendant had prior convictions for violation of Vehicle Code section 10851. As discussed above, pursuant to section 666.5, a section 496d offense must be punished as a felony where, as here, a defendant has a prior felony conviction for violation of Vehicle Code section 10851 and other crimes involving vehicle theft. Nothing in section 666.5 suggests this enhanced sentencing does not apply in cases involving low-value vehicles. Nor has defendant

pointed to anything in Proposition 47 that would indicate the voters intended to reduce the punishment for obtaining a stolen vehicle in cases where the offender has one or more qualifying prior convictions. Like section 496d, section 666.5 is not listed in section 1170.18 as one of the statutory provisions amended by Proposition 47.[3]

For these reasons, we conclude the trial court properly denied defendant's petition to reduce the charge of violating section 496d to a misdemeanor.

B. *No Equal Protection Violation*

We next address and reject defendant's contention his felony conviction for violating section 496d abridged his equal protection rights. The rational basis test governs our consideration of this equal protection challenge. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 839.) The test " ' "requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose." ' " (*Warden v. State Bar* (1999) 21 Cal.4th 628, 641.) "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 315.) "[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.' " (*Ibid.*)

Defendant argues a person who steals a vehicle is similarly situated to a person, such as himself, who receives or conceals the vehicle, and there is no rational basis for treating such persons differently. Defendant is correct that, under certain circumstances, car thieves may be punished less severely than those who receive stolen vehicles.

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[3] Pursuant to section 666, which was amended by Proposition 47, petty theft offenses are misdemeanors for persons with prior convictions for petty theft, grand theft, auto theft, burglary, carjacking, and robbery, among other things. (§ 666, subd. (a).) Had the voters meant to also reduce the penalties for recidivist offenders who receive or obtain stolen vehicles, they could have amended section 666.5. Their decision not to do so once again indicates an intent to treat crimes involving vehicle theft differently than other types of property crime.

Vehicle Code section 10851, subdivision (a) states the unlawful driving or taking of a vehicle may be punished by imprisonment in a county jail for not more than one year, while section 496d, subdivision (a) sets the sentence for receiving a stolen vehicle at either no more than one year or "16 months or two or three years." But, in this case, because defendant had prior convictions, his punishment would have been the same regardless of whether he was convicted under Vehicle Code section 10851 or Penal Code section 496d. Pursuant to section 666.5, any person who has a prior conviction under Vehicle Code section 10851 or Penal Code section 496d and is subsequently convicted of either offense shall be imprisoned for two, three, or four years, or a fine of $10,000, or both.[4]

Defendant also argues his equal protection rights were violated because he is being punished more severely than persons who obtain other types of stolen property worth less than $950. Setting aside the issue of whether defendant actually proved the vehicle at issue was worth less than $950, there are several legitimate and plausible reasons for treating vehicle crimes differently than other types of property crimes. For example, stolen vehicles may be dismantled and sold for parts, which can raise their worth above retail value. Owners of vehicles are typically dependent on those vehicles for necessities, which is not so frequently the case with theft of other forms of property. Moreover, unlike other types of property, stolen vehicles can pose a significant danger to others, especially when driven recklessly.

III. DISPOSITION

The judgment is affirmed.

[4] We need not and do not reach the issue of whether those who unlawfully take or drive a vehicle are similarly situated to those who receive or obtain a stolen vehicle, or the issue of whether there are legitimate reasons for treating these two groups differently.

_____
Margulies, J.

We concur:

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Humes, P.J.

_____
Banke, J.

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